**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.2046 OF 1997**

Lachhiram Chudiwala, H.U.F.
through its Karta/Manager
Shri T.L.Chudiwala, 154/156
Mittal Tower, "B" Wing, 15th
floor, Nariman Point,
Mumbai-400 021. .. **Petitioner**.
(Orig.Plff)

Vs

The Bank of Rajasthan Limited,
a Banking Corporation constituted
under the provisions of Mewar
Companies Act, 1942, and deemed
to have been incorporated under
the Companies Act, 1956, at
195, Kalbadevi Road, 1st Floor,
Mumbai -400 002. .. **Respondents**.
(Orig.Defts)

Mr Kishor Jain a/w Ms Sheetal S. Shah with
Ms Shweta Shetty i/b M/s Mehta Girdharlal, for the
petitioner/plaintiff.

Mr R.D.Dave, i/b M/s N.N.Vaishnava & Co., for the
respondents/defendants.

**CORAM : D.B.BHOSALE,J.**
**DATE : 29th September, 2006**

**ORAL JUDGMENT :**

1. This writ petition under Article 227 of the Constitution of India is directed against the Judgment and order dated 31.8.1996, rendered by the learned Judge of the Small Causes Court at Bombay, by which Misc. Notice No.84 of 1996 in R.A.E.Suit No.57/106 of 1992 taken out by the respondents-defendants, hereinafter referred to as "the defendants", has been allowed. The

suit filed by the petitioner-plaintiff, hereinafter referred to as "the plaintiff", has been decreed in the absence of the defendants and their advocate vide judgment and order dated 17.10.1994, and this judgment has been set aside by the impugned order dated 31.8.1996.

2. The factual matrix, that is relevant and necessary to deal with the questions raised by the plaintiff, is as follows. The plaintiff had filed a suit against the defendants for a decree of eviction in respect of 400 sq.ft area out of the total area in their possession, admeasuring 1600 sq.ft., on the first floor of 195, Kalbadevi Road, Mumbai, hereinafter referred to as "the suit premises". The decree was sought on the grounds of arrears of rent, change of user, nuisance, wastage of property, unauthorised additions and alterations and nonpayment of municipal taxes, which are available under sections 12(1) and 13(1)(a) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short, "the Rent Act"). The defendants were duly served with the suit summons on 6.2.1992. On 16.3.1992, the defendants' Advocate Shri Mehta filed Vakalatnama. The facts set out in the petition reveal that the suit was adjourned from time to time at the request of the advocate for the defendants, who sought

the adjournments for filing their written statement. On 17.9.1993, once again an adjournment was sought on the very same ground and the matter was adjourned to 8.10.1993. However, on 8.10.1993 or thereafter, neither the defendants nor their advocate appeared and as a result of which the suit came to be decreed ex-parte in their absence vide judgment and order dated 17.10.1994. The defendants and their advocate claim that they came to know about the ex-parte decree on 22.1.1996 and immediately on 25.1.1996 they took out Notice No.84 of 1996 for setting aside the ex-parte decree dated 17.10.1994. That application has been allowed by the order dated 31.8.1996, impugned in the present writ petition.

3. I heard the learned counsel for the parties at great length and have gone through the entire material placed on record with their assistance. I do not propose to state in detail the submissions advanced by the learned counsel for the parties at this stage, since I will be making reference to their submissions little later at appropriate stage/s. However, let me make short reference to the submissions advanced and the questions raised by the learned counsel for the parties which I am called upon to address in the judgment. Mr Jain, learned counsel for the petitioners, challenged

the impugned order on three grounds: firstly, that the trial court lacked jurisdiction to entertain the application filed by the defendants for setting aside the decree. The only remedy open to the defendants was to file an appeal against the decree, it being a decree under Order 8, rule 5(2) of the Code of Civil Procedure (for short, "CPC"). The application under Order 9, rule 13 was not tenable for setting aside such decree. Secondly, he submitted that even if it is assumed that the decree is under Order 9, rule 6 of CPC, the defendants have not made out any case or have shown sufficient cause for setting it aside. On the contrary, the facts on record establish that the defendants had been grossly negligent, indifferent towards the process of court and there was total lack of diligence. And lastly, he submitted that the court below ought to have rejected the application as barred by limitation. In other words, the delay in filing the application had not been properly explained, no sufficient cause was shown to condone the delay and hence ought to have been rejected on that ground.

4. On the other hand, the learned counsel for the defendants submitted that by no stretch of imagination it could be said that the decree passed was one under Order 8, rule 5 (2) of CPC. He submitted, it is clear

from the overall facts and circumstances that it was a decree under order 9, rule 6 of CPC and, therefore, it has rightly been set aside by exercising the powers under Order 9, rule 13. He also invited my attention to the material placed on record to contend that the sufficient cause was shown which prevented the defendants from appearing in the suit when it was called on for hearing. Insofar as the delay in filing the application under Order 9, rule 13 is concerned, he submitted that in the matter of condonation of delay, it is well settled that the courts are expected to take pragmatic view and condone the delay and offer fair opportunity to the parties to meet the challenge on merits. Both the learned counsel appearing for the parties made reference to several judgments of this court and of the Supreme Court to which I propose to make reference in the course of the judgment at appropriate stage/s.

5. At the outset, I propose to deal with the first submission advanced by Mr Jain, learned counsel for the petitioners. From the facts of the case and the submissions advanced by the learned counsel, the following question could be formulated : "whether a decree passed in the absence of the defendants and their advocate is a decree under Order 9, rule 6 or is a

decree passed under Order 8, rule 5(2) of CPC, in a suit where summons has admittedly been served on the defendants and where they appear and seek few adjournments through their advocate for filing written statement and fail to do so and then do not appear on the date when the suit was called on for hearing". In other words, "in a suit, where summons has been served, the defendant appears, engages the advocate, seeks few adjournments for filing written statement but fails to do so and then stops appearing and thereafter consistently remains absent and as a result of which the court proceeds to pass a decree, whether such decree is a decree passed under Order 9, rule 6 or under Order 8, rule 5 or 10 of CPC and whether application under Order 9, rule 13 for setting aside such decree would be maintainable".

6. This Court had several occasions to deal with the questions arising out of Order 8, rule 5 or 10, and Order 9, rule 6 and 13 of CPC while dealing with somewhat similar situation/s as has arisen in the present writ petition. For addressing the aforesaid question, it would be relevant to make reference to few judgments of this Court and the Supreme Court to find out the settled position in law.

7. In **Rashtriya Chemicals and Fertilisers Ltd Vs.**

**Ota Kandla Pvt Ltd, 1992 Mh.L.J.1266**, while dealing with the aforestated provisions of CPC, the learned Single Judge (N.D.Vyas,J.) has taken a view that where the defendant is served and represented by a counsel but fails to file his written statement despite the opportunities given to him, the decree passed against him would be one under the provisions of Order 8, rule 10 of CPC and an application under Order 9, rule 13 for setting aside such a decree is not maintainable. Though the facts were somewhat similar, one distinguishing factor needs to be taken note of. In that case, on the date of hearing of the suit, the advocate for the defendants was present in the court. In other words, the defendants were present on the date of decree through their counsel before the court. In **Laxman Zingraji Adhau Vs Sushila Zinguji Thakre and others, 1995 (4) Bom. C.R. 677**, another learned Single Judge (R.M.Lodha,J.), after referring to the judgment in **Rashtriya Chemicals case** (supra), also took a similar view. In short, it has been held in the said judgment that a decree which is passed in the absence of the defendant is an ex-parte decree. In other words, when the defendant is present or his advocate representing him is present, the decree passed is not strictly speaking an ex-parte decree as contemplated by Order 9 Rule 13 because the said provision contemplates absence

of the defendant. In both the aforesaid judgments, the view taken was that a decree under Order 8, rule 5 can only be passed in the presence of the defendants on account of failure to file the written statement. Yet another learned Single Judge (Palshikar, J.) in **Manomal Kushaldas Sindhi Vs Gangadhar Pannalal Rai**, Civil Revision Application No.489 of 1981 decided on 23.11.1981, took a similar view. However, Kapadia, J., as he then was, in Notice of Motion No.2810 of 1990 in Suit No.3418 of 1987, vide judgment dated 26.2.1993, took a view that a decree under Order 8, rule 5 can be passed even in the absence of the defendant.

8. In view of the divergence of views taken by different learned Single Judges of this Court, a reference was made by another learned Single Judge (S.S.Nijjar, J.) in **Dhanwantrai R Joshi and Ors Vs Satish J Dave & ors**, while dealing with Notice of Motion No.2956 of 1995 in Suit no.1557 of 1990 for deciding the following question. "Whether a decree passed in the absence of the defendant and his counsel is a decree passed under Order 9, Rule 6 or is it a decree passed under Order 8, Rule 5 if the same is also passed on the ground that the written statement has not been filed." It would be advantageous to reproduce the concluding paragraphs of the reference order to understand better

the background against which the reference was made.

> "Admittedly in the case decided by Justice Kapadia, defendant nos 6 and 7 were absent. But relying upon the judgment of Justice Vyas it has been held that when a decree is passed under Order VIII Rule 5 and Rule 10 then no application can be made under Order IX rule 13. A perusal of the facts on the basis of which Justice Vyas gave the earlier judgment in the case of Rashtriya Chemicals (supra) would show that therein the defendants were represented by the counsel. Thus it was held that the decree has been passed under Order VIII Rule 5 but in the case before Justice Kapadia, defendant nos 6 and 7 were absent. To my mind applying the ratio of this Court given in the case of Laxman Zingraji (Lodha,J.), Rashtriya Chemical (Vyas, J.) and Manomal (Palshikar, J.) **it would have to be held that when a decree is passed in the absence of the defendants then it is a decree passed under Order IX Rule 6. Therefore, there seems to be divergence of opinion on the question as to when can a decree be said to be a decree passed under Order IX Rule 6 and the one passed under Order VIII Rule 5**. Indeed the perusal of the decree passed in the present case would clearly show that it could easily fall under both the categories. With regard to defendant no.1 a decree has been passed as defendant no.1 was absent though he was served. But the decree has also been passed on account of the fact that the written statement has not been filed. On the other hand in paragraph 2 of the same decree the defendant nos 2 and 3 have been granted an adjournment in order to file the written statement. Even in the face of the above, Mr Gidwani, learned counsel for the plaintiff, submits that the decree has been passed under Order VIII Rule 5;

the first line in the judgment is superfluous; it can have no legal effect because it merely records that the defendant no.1 is absent although he has been served. This argument of Mr Gidwani could well be accepted if the first line in paragraph one and the second paragraph of the decree did not exist. If the decree against defendant no.1 had been passed purely for the reason that no written statement has been filed, then the same decree could have been passed against defendant nos 2 and 3 also. These defendants also did not file the written statement. The only difference between the situation of defendant no.1 on the one hand and defendant nos 2 and 3 on the other hand was that defendant no.1 was absent and defendant nos 2 and 3 were present. **Thus, in my opinion, the decree against defendant no.1 has been passed under Order IX Rule 6. Prima facie, I am of the view that the application under Order IX Rule 13 would be maintainable. As narrated above, Palshikar, J., Vyas, J and Lodha, J. have taken the view that a decree under Order VIII Rule 5 can only be passed in the presence of the defendant, on account of failure to file written statement. Justice Kapadia holds that a decree under Order VIII Rule 5 can be passed even in the absence of the Defendant. Mrs Justice K.K.Baam in the present case has passed a decree noticing that the defendant is absent and the written statement is also not filed**. The defendant claims it to be a decree under Order IX Rule 6. The plaintiff claims it to be a decree under Order VIII Rule 5. In view of the divergence of views of this court as explained above it is necessary that the matter may be settled authoritatively by a larger Bench of this Court."

(emphasis supplied)

The reference was decided by a Division Bench (M.B.Shah,

C.J. and Y.S.Jhahagirdar, J.) vide judgment dated 30.9.1998 and 8.10.98 reported in **1998 (4) All Maharashtra Reporter 509.** This judgment is hereinafter referred to as "Dhanwantrai's case".

9. The Division Bench in Dhanwantrai's case has endorsed the view taken by the learned Single Judge in Rashtriya Chemicals' case (supra). The said view of the learned Single Judge was also confirmed in appeal by a Division Bench of this Court consisting of P.D.Desai, C.J.and S.H.Kapadia, J.,as they then were. The said view was also referred by another Division Bench of this Court consisting of Ms Sujata Manohar, C.J. & Dr.B.P.Saraf, J., as they then were, in appeal No.169 of 1994, decided on 31.3.1994, and held that there was no reason to take a different view from the one taken by the learned Single Judge (N.D.Vyas,J.). The Division Bench in Dhanwantrai's case considered the scheme of the relevant provisions and also a landmark Judgment of the Supreme Court in **Sangram Singh Vs. Election Tribunal Kotah and anr, AIR 1955 SC 425**. It would be advantageous to reproduce the relevant observations made by the Division Bench after considering the scheme of the relevant provisions and the judgment of the Supreme Court in Sangram Singh case. The relevant paragraphs 12 to 15 read thus :

"12. In our view, considering the scheme of Order VII Rule 5 or Rule 10, as well as Order IX, it is fields apparent that both operate in different.

Order VIII Rule 5 specifically provides that if Defendant fails to file Written Statement as contemplated therein the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in accordance with Order VIII Rule 5(4). Similarly, if a party from whom Written Statement is required under Order VIII Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on nonfiling of Written Statement cannot be considered to be an exparte decree as contemplated under Order IX Rule 6. These types of decrees are passed because of failure to file Written Statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the Defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the Defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.

13. As against this, under Order IX, the Court is required to follow different procedure. Order IX Rule 1 provides that on the day fixed in the summons for the Defendant to appear and answer, the parties shall be in

attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. **This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX Rule 3. If the Defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard exparte and to proceed further with the hearing of the suit. This requires recording of evidence and to proceed with the matter. After recording evidence exparte, the Court can pronounce judgment on the basis of the evidence which is brought by the Plaintiff. In such cases, the suit is not disposed of as provided under Order VIII Rule 5 or Rule 10 on the basis of the averments made in the plaint**.

14. Further under Order IX Rule 13, the Defendant is entitled to file application for setting aside exparte decree on two grounds, namely

(i) that the summons was not duly served and (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. This also indicates that the suit is required to be fixed for hearing and on the date of hearing the defendant is absent.

15. In this view of the matter, in our view, application under Order IX Rule 13 is not maintainable when the Court has passed a decree under Order VIII Rule 5 or Rule 10 of the C.P.C. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or Rule 10 thereof for non-filing of Written Statement. The only remedy open in such cases is to file an appeal against such decree. Decree under Order VIII Rule 5 or Rule 10 is passed because of the specific provisions under Order VIII that every allegation of fact in the plaint, if not denied specifically

> or by necessary implication or stated to be not admitted in the pleading of the Defendant, then it shall be taken to be admitted except against a person under disability, and thereafter there is a provision that the Court has discretion to pronounce judgment on the basis of the facts contained in the plaint. This scheme is totally different from the scheme of passing exparte decree under Order IX."
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> (emphasis supplied)

10. On perusal of the judgment in **Dhanvantrai's** case, it is clear that an application under Order IX Rule 13 is not maintainable when the Court has passed a decree under Order VIII Rule 5 or Rule 10 of CPC. There is no provision in Order VIII for setting aside a decree passed under rule 5 or 10 thereof for nonfiling of written statement. The only remedy open in such cases is to file an appeal against the decree. It is also clear that where a suit is fixed for hearing and on the date of hearing if neither party appears then the suit could be dismissed as provided under Order 9 rule 3. However, where the defendant only fails to appear on the date of hearing, under Order 9 Rule 6(1)(a) the Court is empowered to pass an order that the suit be heard ex-parte and then to proceed with hearing of suit on the adjourned date. And if on the adjourned date of hearing also the defendant fails to appear, the Court after recording of evidence ex-parte can pronounce the

judgment on the basis of the evidence which is brought by the plaintiff. In such cases, the suit cannot be said to have been disposed of under Order 8, rule 5 or rule 10 on the basis of the averments made in the plaint. In other words, if the defendants or their advocate fails to appear when the suit is called on for hearing and if the court passes an order that the suit be heard ex-parte and then proceeds to hear the suit ex-parte, records evidence and then pronounce the judgment, it cannot be treated as one under Order 8, rule 5 or rule 10 passed on the basis of the averments made in the plaint. In the present case, admittedly after seeking time on few dates for filing written statement all of a sudden the defendants and their advocate stopped appearing in the case and as a result of which the Court was forced to proceed with the hearing of the suit and pass a decree in the absence of the defendants and their advocate.

11. Mr Jain, learned counsel for the petitioner, submitted that the Court can set aside an ex-parte decree under Order 9, Rule 6 only in the following eventualities. Firstly, where the summons was not duly served on the defendant secondly, where after service of summons thedefendant appears,files written statement and thereafter he and his advocate fail to appear when the

suit is called on for hearing; and thirdly, in a suit where the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. In other words, he submitted that in a suit where the summons was duly served on the defendant and the defendant appears in a suit through his advocate and does not file written statement despite the opportunities and then fails to appear when the suit is called on for hearing and if the court proceeds to decide the suit ex-parte, such decree would be one under Order 8 Rule 5 or Rule 10 and not under Order 9 Rule 6 of CPC. Mr Jain further submitted that in a suit where the defendant appears, files written statement but fails to appear thereafter then the Court can proceed to decree the suit and such decree would be one under Order 9 Rule 6 of CPC because in such a situation in the face of the defendant's written statement the plaintiff needs to prove his case by leading evidence and the court cannot decree it solely on the basis of untraversed averments in the plaint. Even if what Mr Jain argued is accepted it does not mean that in a suit where the defendant appears through his advocate and seeks adjournment from time to time for filing written statement and then stops appearing in the suit forcing the court to decide it in the absence of the defendant and his advocate as also in the absence of written

statement, the decree,if passed, is not covered under Rule 6 of Order 9 CPC.

12. Order 9, nowhere provides that on the basis of the averments made in the plaint the court can pass a decree. The court has to proceed with a suit in the absence of defendants and try the suit and pass appropriate decree. The scheme of rules 6 to 13 of Order 9 would shows that if the defendants and their advocate do not appear when the case is called on for hearing the Court is required to make an order that the suit be heard ex-parte and adjourn the matter for recording of evidence and pass a decree. If on the adjourned date neither the defendants nor their advocate appear, as contemplated by rule 7, the Court can proceed to pass a decree under rule 6 of Order 9 and such decree can be set aside under rule 13 of Order 9. In the present case, though it is not clear as to whether there was an order that the suit would be heard ex-parte as provided for under Rule 6(1)(a) of Order 9, the Court has recorded in paragraph 2 of the judgment dated 17.10.1994 that "since the defendants after service of summons remained absent the suit proceeded ex-parte" indicates that court passed such order and, accordingly, proceeded to record evidence and pass a decree. In the present case, as observed by the Division Bench in

**Dhanwantrai's** case, the defendants failed to appear on the date of hearing and, therefore, the court proceeded further with the hearing of suit and after recording the evidence decreed it in the absence of the defendants and their advocate. It is thus clear that even if the defendant appears, his advocate files appearance, seeks adjournments for filing written statement and they fail to appear when the suit is called on for hearing the Court is empowered to pass an order to proceed ex-parte and decide the suit on the next date of hearing after recording an evidence in their absence. Such decree is a decree under Order 9 rule 6 of CPC and it could be set aside under Order 9, Rule 13. It would not be possible to agree with the submission of Mr Jain that a decree in a case where summons has admittedly been served on the defendants and the written statement has also been filed, and if the defendants fail to appear on the date of hearing, then alone such decree could be treated as one under Order 9, rule 6. It is true, as submitted by Mr Jain, merely because a plaintiff is directed to prove his case in the absence of the defendant, his advocate and their written statement, does not mean, in every such case, a decree passed is one under Order 9 Rule 6 and not under Order 8 Rule 5. The Supreme Court in **Balraj Taneja Vs. Sunil Madan, AIR 1999 Supreme Court 3381,** has made that clear. However, whether Court has

proceeded to pass a decree under Order 9 Rule 6 or Order 8 Rule 5 or 10 is a matter of appreciation and that has to be appreciated from the facts of each case.

13. At this stage, a reference could also be made to the Judgment of yet another learned Single Judge of this Court (N.V.Dhabholkar,J.) in **Badrinarayan s/o Raghunath Sharma Vs Suresh Nathamal Gothawal, 2002(4) Mh.L.J. 522**. In this case, the learned Single Judge was dealing with the provisions of Order 9, rule 6 and 13 read with Order 17, rule 2 to consider in what circumstances a judgment delivered in the absence of written statement could be treated as one under Order 9 rule 6. The observations in paragraphs 8 and 10 of the report may be relevant which read thus :

> "8. Taking into consideration paragraphs 12 and 13 of the judgment, it is clear that in view of judgment of the Division Bench, **a judgment delivered under the rule of 'non traverse' is a judgment delivered under Order 8, Rule 5 or Rule 10**. In such matter, the Court decides the suit in favour of plaintiff sheerly on the basis of averments in the plaint, which are not controverted by a written statement of defendant either on the first day or in spite of sufficient opportunity. The affidavit of plaintiff to support the plaint is a mere formality and it is not evidence laid to prove the contentions in the pleadings. **However, when the Court does not deliver**

**a judgment immediately on failure on the part of defendant to file written statement of defence and calls upon plaintiff to lead evidence, it is obvious that the Court is not inclined to deliver a judgment in favour of plaintiff under rule of non traverse, but it proceeds to record the evidence of plaintiff and delivers the judgment in favour of plaintiff in the circumstances 'non appearance"**. In one sentence, the judgment under the principle or rule of non traverse is one under Order 8, Rule 5 or 10 and a judgment in favour of plaintiff due to non appearance of defendant is a judgment ex parte. The first one is not amenable to remedy under Order 9, Rule 13 whereas the latter is so amenable."

"10. Taking into consideration the facts of the case at hands, had the trial Court delivered the judgment on any of the dates from 12-12-1997 to 11-2-1998 only on the basis of affidavit of plaintiff, the judgment could have been termed to be judgment under Order 8, Rule 5. However, as is evident from subsequent event, the Judge not only recorded the evidence of plaintiff, but was also inclined to allow defendant to lead evidence, although without written statement. Not only that, ultimately on 9-3-1998, he has recorded that the evidence of defendant is dispensed due to his absence and the matter was ordered to proceed further under Order 17, Rule 2 of Code of Civil Procedure. Advocate Shri Dube has taken an exception to this last endorsement saying that the Court has taken a total about turn. In fact, the same will have to be described that the Court has come to correct track only on 9.3.1998. **If the Judge was inclined to deliver a judgment on the principle of non traverse, there was no necessity to adjourn the matter for hearing and invite the plaintiff to lead evidence. Since the plaintiff was so invited and ultimately the judgment was delivered,**

> **when the defendant was absent,it was a judgment, as rightly held by the District Judge; one under Order 9, Rule 6 read with Order 17, Rule 2 of Code of Civil Procedure and, therefore, remedy under Order 9, Rule 13 was available."**
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> (emphasis supplied)

14. In the present case also, sufficient opportunity was given to the defendants to file written statement. The Court could have decreed the suit on the basis of the facts contained in the plaint. But from the sequence of events, it is clear that the court was not inclined to deliver the judgment in favour of the plaintiff under "rule of non traverse" but the Court proceeded to record the evidence of the plaintiff and delivered the judgment in the circumstance "nonappearance". In the present case, if the Judge was inclined to deliver a judgment on the principle of non traverse, there was no necessity to adjourn the matter for hearing and could have decided the suit on the basis of the averments in the plaint. As a matter of fact the Court, in the present case, adjourned the hearing after passing the order under Rule 6(1)(a) of Order 9, and on the adjourned date of hearing invited the plaintiff to lead evidence and ultimately the judgment was delivered when the defendants and their advocate were absent. Therefore, the Court below has rightly treated the

decree as one under Order 9, rule 6 and, has proceeded to set it aside under Order 19, rule 13 of CPC.

15. In yet another judgment, in **Gaurang V Merchant and Ors Vs. Madhliso & Co Pvt Ltd and Ors, 2004 (2) All MR 737**, the learned Single Judge of this Court (D.G.Karnik, J.) had an occasion to deal with the very same provisions and to meet almost similar situation. After considering the judgment of this Court in **Dhanwantrai's** case and **Balraj Taneja and Anr Vs Sunil Madan and Anr, 1999 (8) SCC 396**, the learned Single Judge has taken a view that merely because the defendant has not filed written statement it cannot be said that the decree passed is one under rule 5 or rule 10 of Order 8 and not under Order 9 rule 6 of CPC. That has to be seen on the basis of the facts of each case. In short, it is held that if the facts of the case show that the decree was not passed only on the basis of facts set out in the plaint but after framing an issue and upon recording of evidence, it could be treated as one under Order 9, rule 6 of CPC. I do not find any reason to differ from the view taken by N.V.Dhabholkar, J. and D.G.Karnik, J. the learned Judges in the respective cases referred to above.

16. Thus, it is clear, in a suit where the summons on

a defendant was served and the defendant appears through advocate and seeks time for filing written statement from time to time and then fails to appear when the suit is called on for haring, the court, as provided for under Rule 6(1)(a) of Order 9 of CPC, is empowered to make an order that the suit be heard ex-parte and, in fact, on the adjourned date proceeds to decide the suit ex-parte after recording the plaintiff's evidence in the absence of the defendant or his advocate, such judgment and decree is a decree under Rule 6 of Order 9 of CPC and not under Order 8 Rule 5 or Rule 10. Such decree could be set aside by exercising the powers under Rule 13 of Order 9 of CPC. In the circumstances, the first submission of Mr Jain, learned counsel for the petitioner, must be rejected. In the present case, I have no hesitation in holding that the decree passed by the trial Court is a the decree under Order 9, rule 6 and, the trial Court has rightly set aside the same by exercising the powers under Rule 13 of Order 9 of CPC.

17. That takes me to consider the next submission of Mr Jain, learned counsel for the petitioner, that the respondents have not made out any sufficient cause as contemplated by Rule 13 of Order 9 of CPC for setting aside the ex-parte decree. In support of his submission, he took me through the application of the

defendants dated 25.1.1996 for setting aside the ex-parte decree dated 17.10.1994 and the other material, such as the application of execution of the decree under Order 21 rule 11 of CPC and the notice dated 25.1.1996 in particular. It is clear, though initially it was disputed, that the summons was duly served on the defendants. Their advocate filed Vakalatnama on their behalf and sought time to file written statement from time to time and last such adjournment was granted on 17.9.1993. On that day, the matter was adjourned to 8.10.1993. The defendants, through their Chief Manager Mr M.C. Khandelwal, has filed an affidavit supported by the affidavit of Advocate C.M. Mehta stating that when the matter was adjourned to 8.10.1993, a clerk of Advocate Mehta through oversight forgot to enter the next date, i.e. 8.10.1993, in the diary. Therefore, they lost the track of the suit and, thereafter, it was not attended to by their Advocate either on the said date or on the subsequent dates, resulting in the ex-parte decree on 17.10.1994. Advocate Mehta by his affidavit dated 25.1.1996 supports the averments made in the application dated 25.1.1996 seeking to quash and set aside the decree.

18. It is common knowledge that in trial courts Advocates maintain the diaries and often their clerks

make entries in the diaries of dates in different matters every day. The diary maintained by the advocate's office is the basis for them to keep track of the cases in which they file Vakalatnamas. Even a small omission/error on the part of advocate or his clerk in making entries in the diary may land up the client in trouble. Therefore, it is true and necessary that litigants must keep in touch with their advocate at every stage of the proceedings. They cannot shirk their responsibility in following up their case merely because they have engaged an advocate. In the present case, since the entry of the adjourned date (8.10.1993) had remained to be made in the diary and as a consequence thereof, the advocate did not attend the case, resulting in the ex-parte decree on 17.10.1994. The Chief Manager, on affidavit, has stated that he was following up the matter with their administrative head office at Jaipur seeking instructions to file written statement in the case after the suit summons was served and they had engaged Advocate Mehta to attend the case in the court. It is against this backdrop Mr Dave, learned counsel for the respondents-defendants, submitted that the defendants were prevented by the sufficient cause from appearing when the suit was called on for hearing.

19. Under Order 9, rule 13 of CPC, an ex-parte decree

passed against the defendants can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendants or they were prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendants in the case on the date of hearing, the Court has no power to set aside an ex-parte decree. The Supreme Court in **G.P.Srivastava V. R.K.Raizada and ors, 2000 (3) Supreme Court Cases 54** has observed that the words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9, Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. Thus, the Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case.

20. It is well settled that "sufficient cause" for nonappearing refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon the other circumstances anterior in time. Previous conduct or negligence may not be

relevant while considering whether the defendants have shown sufficient cause for nonappearance on the date on which an ex-parte decree was passed. Merely because the defendants were not diligent in filing written statement or giving instructions to their advocate for filing written statement despite repeated adjournments having been asked, that cannot be taken into consideration while considering whether the defendants were prevented by sufficient cause to appear on the date on which the ex-parte decree was passed by the trial Court. The defendants cannot be penalised for their previous negligence, which had been overlooked and/or condoned earlier by granting time to the defendants for filing written statement from time to time. I do not see any other reason than the omission or lapse on the part of the clerk of the advocate in making an entry in the diary resulting nonappearance of the defendants or their advocate on all the subsequent dates. An omission or lapse to make an entry in a diary by the a clerk can be attributed only to the advocate and not to the litigant. Therefore, at the most, it could be a case of negligence, insofar as nonappearance on the date of a decree is concerned, attributable to the Advocate and his office. The litigant cannot be made to suffer for such inaction, omission, or misdemeanour of his lawyer as held by the Supreme Court in **Rafiq and anr Vs.**

**Munishilal and Anr, AIR 1981 SC 1400**. This Court also in **Ashok Ravji Vadodriya Vs. Municipal Corporation of Greater Mumbai, 2003 (4) Bombay C.R.28** has taken a view that it would not be appropriate to hold that it is a duty of a litigant to attend the Court and convey the adjourned date to his advocate. It is a duty of an advocate engaged for conducting the case on behalf of a suitor to keep himself fully informed all proceedings in court and to remain present when his case is called on. In view of the peculiar facts and circumstances of the case, the judgments relied upon by Mr Jain on the question whether the defendants were prevented by the sufficient cause from appearing in the court on the date of the decree, are of no avail to the plaintiff. Mr Jain, relied upon the Judgment of the Supreme Court In **Salil Dutta Vs T.M. and M.C. Pvt Ltd, (1993) 2 SCC 185** and the judgment of this Court in **Dwarka Cement Works Ltd Vs. Rajesh Jain, 2000 (4) All MR 322**. As a matter of fact, I find support for view in the aforesaid decisions. In the circumstances, the second submission of Mr Jain also deserves to be rejected.

21. Lastly, Mr Jain, after inviting my attention to the application of the defendants dated 25.1.1996, submitted that the facts on record establish that the defendants have been grossly negligent, indifferent

towards the process of court and there was total lack of diligence and, therefore, they do not deserve any indulgence by the Court. He submitted that while passing the decree, since the defendants and their advocate were not present, the Court had directed issuance of notice before execution. Such notice was in fact issued and was received by the defendants on 27.9.1995. The Chief Manager on behalf of the defendants in paragraphs 9 and 10 of the application on affidavit has admitted that after he was served with the notice on 27.9.1995 he had simply handed it over to his peon to deliver it to their advocate and despite this fact, according to Mr Jain, the Chief Manager has made a false statement in paragraph 8 of the application, stating that he came to know about the ex-parte decree only on 22.1.1996. On that date, he states, when he had gone to meet his advocate in the Court and on search of the record having been taken by them, they found that the suit had already been decreed ex-parte on 17.10.1994. It is true that the Chief Manager of the defendant-Bank has stated so in paragraphs 8 to 10. However, a careful perusal of the statements made in paras 8 to 10 would show that he recollected receipt of the notice dated 27.9.1995 only when his advocate, after examining the record informed him that such notice was served on him. He has fairly admitted that the notice

was served on him but he had lost sight of the said notice after giving it to the peon for delivering it to the advocate. It appears that he did not even realise that the notice was in execution proceedings and, therefore, had forwarded it to the advocate for further action. It is true that to some extent the defendants were negligent in following up the matter despite having been received the notice in the execution proceedings. But that, by itself, in my opinion, in the face of the facts and circumstances of the case, is not sufficient to nonsuit the defendants and inflict upon them a drastic decree of eviction. The defendants claim that they came to know about the ex-parte decree only upon taking search of the record on 22.1.1996 and immediately on 25.1.1996 they filed the application for setting aside ex-parte decree. They approached the court immediately after they realised that the suit had already been decreed.

22. The legislature has conferred the powers to condone delay by enacting section 5 of the Indian Limitation Act,1963 in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed is adequately elastic to enable the court to apply the law in the meaningful manner which subserves the ends of

justice. The respondents-defendants, in the present case, did not stand to benefit by filing an application for setting aside the ex-parte decree at belated stage. It cannot be presumed that the delay was occasion deliberately. What the Supreme Court in **State of Nagaland Vs. Lipok AO and ors, (2005) 3 Supreme Court 752**, while interpreting the words "sufficient cause" in paragraphs 8 and 9, has observed, may be referred to at this stage, which reads thus:

> "8. The proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction (sic discretion) vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In N.Balakrishna V M.Krishnamurthy, AIR 1998 SC 3222 it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

> 9. What constitutes sufficient cause cannot be laid down by hard-and-fast rules. In New Indian Insurance Co.Ltd V Shanti Misra, (1975)2 SCC 840 this Court held that discretion given by Section 5 should not be defined or crystalised so as to convert a discretionary matter into a rigid rule of law. The expression "sufficient cause" should receive a liberal construction. In Brij Indar Singh V Kanshi Ram, AIR 1917 PC 156 it was observed that true guide for a court to exercise the discretion under section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575 a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned."

The expression "sufficient cause", as observed by the Supreme Court, should receive liberal construction. If we go in the position of the defence to find out whether the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. The answer thereto, in the face of the facts of the present case, in my opinion, must be given in the affirmative. Moreover, we also have to take practical view of the working of the organisation like the one of the defendent-Bank where the instructing

officer who is incharge of the case, requires clearance, permission and instructions from the head office on every small or vital question. In the present case, the delay caused, in any case,cannot be said to be malafide and the mistake committed by the Chief Manager and the advocate for the Bank was tainted by any malafide motive. Moreover, the mistake of the counsel by itself in the facts of the present case is sufficient cause for condonation of the delay. The advocate in the present case did not bother to attend the case after 8.10.1993 or even to find out what happened to the case and why it was not coming on board, which, in my opinion, should not come in the way of the litigant who has prayed for condonation of delay in filing the application for setting aside ex-parte decree. In the circumstances, I find no merit in the last submission of Mr Jain. The writ petition is dismissed. Rule discharged. No costs.

. The trial Court may proceed to hear the suit after taking the written statement of the defendants on file and decide it as expeditiously as possible and preferably within a period of six months from the date of receipt of this order.

**(D.B.Bhosale,J.)**